

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**JOHN GUSWIN SIEBENMORGAN**  
Claimant

VS.

**R.L. LEINTZ FUNERAL HOME LLC, ET AL<sup>1</sup>**  
Respondents

AND

**NATIONWIDE MUTUAL INSURANCE  
CONTINENTAL WESTERN INSURANCE**  
Insurance Carriers

**KANSAS WORKERS COMPENSATION FUND**

Docket No. 1,010,607

**ORDER**

R.L. Leintz Funeral Home, LLC requested review of the February 22, 2006 Award and February 24, 2006 Award Nunc Pro Tunc by Administrative Law Judge (ALJ) Steven J. Howard. The Board heard oral argument on August 8, 2006.

**APPEARANCES**

Dennis L. Horner, of Kansas City, Kansas, appeared for the claimant. Frank Eschmann, of Topeka, Kansas, appeared for Leintz Excavating Co. Ron Laskowski, of Topeka, Kansas, appeared for Allied Mutual/ Nationwide Insurance Co. (Nationwide). Heather Sigler, of Kansas City, Kansas, appeared for Roc-Man Drywall and Berkley Risk Administrators (Berkley). Seth G. Valerius, of Topeka, Kansas, appeared for respondent R.L. Leintz Funeral Home, LLC. Tim Elliott, of Shawnee Mission, Kansas, appeared for

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<sup>1</sup> Claimant identified the following potential respondents: R.L. Leintz Funeral Home LLC, Kent Leintz, individually and d/b/a Leintz Excavating, Dennis W. Rodgers, individually and d/b/a Roc-Man Drywall, Kevin C. Lis, individually d/b/a Lis Electronic and Lis Mechanical, and Kent Leintz, Dennis Rogers and Kevin C. Lis, as representatives and owners of R.L. Leintz Funeral Home.

the Kansas Workers Compensation Fund (Fund). Kevin C. Lis, of Leavenworth, Kansas and Kent Leintz, both of Leavenworth, Kansas, appeared pro se.<sup>2</sup> Although the Board provided David Forge and David Rogers were provided with written notice of the oral argument before the Board, neither elected to appear or send a representative.<sup>3</sup>

### **RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument the parties that were present agreed that there is no dispute as to the compensation rate, medical bills, duration of temporary total disability or of the nature and extent of claimant's impairment as set forth in the ALJ's Award and subsequent Award Nunc Pro Tunc. The parties further agreed, at least as of the date of oral argument, that no evidence has been offered that would suggest the Fund has any liability in this matter based upon insolvency, although many of the respondents are uninsured.

### **ISSUES**

The ALJ found the claimant suffered an accidental injury on January 3, 2003 arising out of and in the course of his employment with respondent R.L. Leintz Funeral Home, LLC (Leintz Funeral Home), an admittedly uninsured entity. The ALJ also concluded that Leintz Funeral Home failed to establish that it was unable to pay the entirety of the Award as required by K.S.A. 44-532a. Thus, the ALJ went on to conclude that "the entirety of this award is to [be] born by R.L. Leintz Funeral Home, LLC, and any expenses associated in the prosecution of this claim."<sup>4</sup>

Leintz Funeral Home requests review of this Award. Leintz Funeral Home contends that it was not claimant's employer and that as a result, his injury could not have arisen out of or in the course of any employment relationship between the two. Rather, this respondent maintains claimant was either an independent contractor or an employee of David Forge, another independent contractor who was working on this same construction project. Alternatively, Leintz Funeral Home suggests claimant was an employee of Leintz

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<sup>2</sup> After this case was appealed but before oral argument could be held, John Carpinelli moved to withdraw as counsel for Kent Leintz and Leintz Excavating Co. That motion was granted by the ALJ and Frank Eschmann entered his appearance for Leintz Excavating Co. and Ron Laskowski entered his appearance for Allied Mutual/Nationwide Insurance Co. Thus, Mr. Carpinelli did not appear at the oral argument in this matter.

<sup>3</sup> This matter was originally scheduled for oral argument on July 6, 2006. At the commencement of that hearing, the Board expressed a concern that not every individual had received notice of the hearing. Out of an abundance of caution, the Board elected to adjourn the proceedings and reset the oral arguments, ensuring that written notice was given to each litigant. Thus, the matter was reset for August 8, 2006.

<sup>4</sup> ALJ Award (Feb. 22, 2006) at 6.

Excavation. Thus, Leintz Funeral Home maintains under these facts, that the Kansas Workers Compensation Act does not apply and the Award should be reversed and set aside.

Claimant argues that the ALJ's Award should be affirmed in all respects. Succinctly put, claimant argues that all the evidence suggests that Leintz Funeral Home was his employer at the time of the accident and that nothing within the record even remotely suggests an employment relationship between claimant and any other individual or entity involved in this matter.

Respondents Dennis Rogers and Roc-Man Drywall maintain claimant failed to establish an employment relationship between himself and either of them and as such, the Award should be affirmed as written.

Likewise, Leintz Excavating and its insurance carrier Nationwide, contend there is no evidence to suggest that claimant was at any time an employee of Leintz Excavating.

The Fund argues that the ALJ's Award should be affirmed, at least insofar as there is a lack of any evidence suggesting Leintz Funeral Home is unable to pay the claimant's Award.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On January 3, 2003, while the claimant was working on a construction site he was struck in the right eye with a nail from a pneumatic gun.<sup>5</sup> There is no dispute that claimant lost his right eye as a result of this accident and has suffered a 100 percent loss of his eye along with medical expenses. How claimant came to be at the construction site on that date and who employed him is at the heart of this claim.

Claimant is, by trade, a union brick layer. He normally works for Maderak Construction installing brick. During the winter of 2002, claimant's work assignments were slowing down and he was in need of employment.

At about this same time, David Forge, a rough-in carpenter, was contacted by Kent Leintz, one of the owners of Leintz Funeral Home. Mr. Forge had worked with Mr. Leintz in the past as an independent contractor, and testified that on those smaller jobs, he was compensated on a "per job" basis.

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<sup>5</sup> R.H. Trans. at 14.

In the Fall of 2002, Mr. Leintz and 2 other people were building a funeral home and they required laborers. Mr. Forge did not feel comfortable bidding this job on a “per job” basis and instead, asked to be paid an hourly rate of \$25 per hour. Mr. Forge also indicated that he knew a couple of people who could work as well and that they would need to be paid \$30 an hour, collectively. Mr. Forge also made it clear to Mr. Leintz that he did not want to handle the money for these other laborers, and that Mr. Leintz would need to pay them directly.

Claimant’s son, Ryan, was contacted by David Forge about the employment opportunity. Ryan went to his father and asked if he was interested in performing general labor work for \$15 an hour on a full-time basis, weather permitting. Claimant agreed and the two of them took a few tools and went to the construction site. Both Ryan and claimant understood they were to be paid \$15 per hour and understood that they would be paid not by Mr. Forge but by Leintz Funeral Home, whose building was being constructed.

According to claimant, Kent Leintz was at the construction site when they arrived. Mr. Leintz, who also owns an excavation company, supplied various tools, and had possession of the construction plans for the project. Claimant testified that Mr. Leintz generally directed the three men as to what materials to use and how the building was to be laid out. Put simply, “[w]hatever he [Leintz] told us that’s kind of the way the walls went up.”<sup>6</sup> The claimant further testified that Leintz worked with or saw the men nearly each day. Conversely, claimant says neither Dennis Rogers or Kevin Lis, Kent Leintz’s business partners<sup>7</sup> in the Leintz Funeral Home, ever supervised or exerted any control over his activities during this construction project. According to claimant, although he took some direction from Mr. Forge, he considered himself an employee of the Leintz Funeral Home and “Kent [Leintz] was, he was building the building.”<sup>8</sup> Neither Mr. Forge, nor Mr. Leintz controlled claimant’s work hours and he would sometimes leave the site to complete farm chores.

Kevin Lis, one of Mr. Leintz’s business partners, testified that he provided the electrical and mechanical labor and materials for this job. Other than this, he had no further contact with the project and he specifically testified that he did not supervise or direct either Mr. Forge or the claimant.

During the course of the project and before claimant’s injury, various potential employees would come to the site and inquire as to the possibility of employment. In every instance, Mr. Forge would refer them to Kent Leintz. Mr. Forge testified that Mr. Leintz had

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<sup>6</sup> *Id.* at 10.

<sup>7</sup> The term “partner” is generic as the true legal nature of the relationship of Leintz, Rogers and Lis is unclear in this record.

<sup>8</sup> R.H. Trans. at 13

the right to direct the job site and its progress.<sup>9</sup> Time sheets were completed by each laborer and given to Mr. Leintz for payment by Leintz Funeral Home.

Claimant received one check for his work on this project. That check was issued by Leintz Funeral Home and reflects a gross payment for hours spent up to the time of his injury. No taxes were deducted from this pay. Other bills associated with the construction of this building were paid for by Leintz Funeral Home.

Kent Leintz testified that he is one of the owners of the funeral home and in charge of the day-to-day operations.<sup>10</sup> Mr. Leintz indicated that he believed claimant to be Mr. Forge's employee because it was Mr. Forge who suggested they work on the project and they were always on the site while Mr. Forge was there. Mr. Leintz further testified that he did not supervise or train either claimant or claimant's son (as he is not a carpenter), and that it was Mr. Forge who guided the two of them by deciding what work was going to be done and who was going to do what.<sup>11</sup> Mr. Leintz denied that he controlled the progress of the work, and appeared to believe that Mr. Forge and claimant, along with claimant's son, knew what to do and when to do it, and required no input from him. This contention is inconsistent with a newspaper article that lists Mr. Leintz as the general contractor as well as the testimony offered by David Forge.

The ALJ noted that "[t]he testimony of Kent Leintz is in direct contradiction of the testimony of claimant, David Forge, and others who have testified herein."<sup>12</sup> He went on to find as follows -

Based upon the preponderance of evidence, the administrative law judge clearly finds that Kent Leintz was the partial owner/principal operator of the R.L. Leintz Funeral Home, LLC, at the time of claimant's occupational accident on January 3, 2003. That Mr. Leintz had the ability to control the actions of both Mr. Forge and the claimant, and there was no contractual relationship between the latter two. Further, the evidence clearly indicates payment was made on an hourly basis directly from R.L. Leintz Funeral Home, LLC to the claimant. Based upon the foregoing, the preponderance of evidence including the hours worked, the materials provided by the funeral home, the equipment that was provided by the funeral home, and all the testimony herein presented, John G. Siebenmorgen was an employee of the R.L. Leintz Funeral Home, LLC.<sup>13</sup>

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<sup>9</sup> Forge Depo. at 11.

<sup>10</sup> Leintz Depo. at 8.

<sup>11</sup> *Id.* at 42-43.

<sup>12</sup> ALJ Award (Feb. 22, 2006) at 5.

<sup>13</sup> *Id.* at 5-6.

He also concluded that Leintz Funeral Home was, based upon the evidence contained within the record, able to pay the Award and therefore, the Fund was not liable.<sup>14</sup>

It is the claimant's burden of proof to establish his right to an award of compensation and to prove those conditions on which the claimant's right depends.<sup>15</sup> Included within that is the obligation to establish that claimant's injury arose out of his employment relationship.

The primary test utilized in Kansas to determine whether an employee/employer relationship exists is whether the employer has the right of control and supervision of the work of the employee. This involves the right to direct the manner in which the work is performed as well as the result which is to be accomplished. It is not the actual exercise of control, but the right to control which is determinative.<sup>16</sup>

In examining the legal nature of a business relationship, the courts have also looked at other factors, including but not limited to: (1) whether a contract exists to perform a certain piece of work at a fixed price; (2) the independent nature of the worker's business or distinct calling; (3) whether the worker employs assistants over which the worker has the right to supervise their activities; (4) the worker's obligation to furnish tools, supplies, and materials; (5) the worker's right to control the progress of the work; (6) the length of time the worker is employed; (7) whether the worker is paid by time or by the job; and (8) whether the work being performed is part of the regular business of the employer.<sup>17</sup>

In this instance, the record indicates there was very little organization much less control on this construction project. And there is a distinct difference between Mr. Leintz's version of events and that offered by the balance of the other witnesses. Nonetheless, of the evidence offered, the Board agrees with the ALJ that Leintz Funeral Home was the claimant's employer.

Leintz Funeral Home, through Kent Leintz, was the one constant presence on the construction project. Mr. Leintz concedes that he was mainly responsible for coordinating this construction project.<sup>18</sup> Mr. Leintz sought out Mr. Forge to work as a laborer on this project and agreed to pay him on an hourly basis. The fact that Mr. Forge had, in the past,

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<sup>14</sup> K.S.A. 44-532a.

<sup>15</sup> *Hughes v. Inland Container Corp.*, 247 Kan. 407, 799 P.2d 1011 (1990).

<sup>16</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994); *Falls v. Scott*, 249 Kan. 54, 815 P.2d 1104 (1991); and *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

<sup>17</sup> *McCubbin v. Walker*, *supra*.

<sup>18</sup> Leintz Depo. at 13.

worked as an independent contractor is not determinative of this most recent employment arrangement.

It is uncontroverted that Mr. Leintz also authorized Mr. Forge to contact claimant and arrange for them to work on this project. Based on Mr. Forge's testimony and that of the claimant, Mr. Forge was acting as an agent of Leintz Funeral Home in procuring claimant's participation in this project. There was no agreement between Mr. Forge and claimant that Mr. Forge would pay him or oversee and control his activities. Indeed, Mr. Forge made it clear to Mr. Leintz that claimant would have to be paid directly as Mr. Forge did not want to handle the payment of wages. Thus, the Board finds Mr. Forge and claimant were merely co-workers and that Mr. Forge was not claimant's employer.

Mr. Leintz, as the representative of the Leintz Funeral Home, paid claimant and the other workers and vendors on the job. He regularly came the job site, accepted the time sheets, and procured the necessary materials. His assertion that claimant is, if anything, an employee of Leintz Excavating, a company that actually has workers compensation insurance, is without evidentiary basis in the record. Leintz Excavating did not pay claimant, nor was the work he was engaged in on this project related to the excavation business. Indeed, there is no evidence that Leintz Excavating and claimant had any connection whatsoever except for Mr. Leintz's dual service as a principal in both Leintz Excavation and Leintz Funeral Home.

The Board is equally unpersuaded by Leintz Funeral Home's argument that claimant was an independent contractor. Claimant was paid hourly, while he provided a few tools, the greater number of tools and all the materials were provided and paid for by Leintz Funeral Home. Claimant retained no assistants and in fact, it appears that he was at the bottom of the list of laborers on this project as everyone else was paid more than he and his son received for their work efforts. Based upon the evidence as a whole, it is clear that Mr. Leintz was exerting control at the construction site and, at least to some extent and far more than anyone else, controlled claimant's activities. Thus, the Board finds that the claimant was not an independent contractor.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated February 22, 2006 and the Award Nunc Pro Tunc dated February 24, 2006, are affirmed in all respects.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of August, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant  
Frank Eschmann, Attorney for Leintz Excavating  
Timothy J. Pringle, Attorney for Leintz Excavating  
Ronald J. Laskowski, Attorney for Allied Mutual/Nationwide Ins. Co.  
Heather Sigler, Attorney for Roc-Man Drywall and Berkley Risk Administrators  
Seth G. Valerius, Attorney for R.L. Leintz Funeral Home  
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